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NO. 91-1417

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

OMAR BLANCO,

Respondent/Cross-Petitioner,

vs

HARRY K. SINGLETARY, as
Secretary, Department of Corrections
State of Florida,

Petitioner/Cross-Respondent.

RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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COUNSELS FOR PETITIONER/
CROSS RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE ELEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISIONS IN DENYING HABEAS CORPUS RELEIF ON THE CLAIM THAT THE TRIAL COURT IMPERMISSIBLY INTERFERED WITH THE DEFENSE IN ALLOWING BLANCO TO CALL WITNESSES IN HIS OWN BEHALF SUCH THAT PREJUDICE SHOULD BE PRESUMED.

II. WHETHER THE ELEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISIONS IN DETERMINING THAT NO IMPERMISSIBLY SUGGESTIVE PRETRIAL IDENTIFICATION PROCEDURES WERE UTILIZED SUCH AS TO INDUCE THE WITNESSES TO MAKE A MISTAKEN IDENTIFICATION.

PRELIMINARY STATEMENT

ON March 4, 1992, counsel for Petitioner/Cross-Respondent received the Cross-Petition for Writ of Certiorari filed on behalf of Respondent/Cross-Petitioner, Omar Blanco. Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, the instant response is timely filed.

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STATEMENT OF THE CASE

In order to place the questions presented to this Court in their proper context, it is necessary to provide this Court with the following specific facts regarding Question I:

At trial, BLANCO was presented by two attorneys, Don Tenbrook and Carlos Rodriquez. After two defense witnesses had testified, Tenbrook stated on the record that it was their tactical decision not to call Fidel Romero and Enrique Gonzales as witnesses and that they had tried to explain this to BLANCO (R. 1413).[1] Tenbrook stated that it was BLANCO who asked him to bring this matter to the trial court's attention (R. 1413). The trial court then told counsel it would be helpful to proffer what the testimony of the witnesses would be (R. 1413). Because there was a question as to who had the final say on calling witnesses, the trial court suggested that defense counsel have further discussions with BLANCO. Defense counsel Rodriquez stated he would continue to talk to BLANCO, in that Tenbrook could not talk directly to BLANCO because of the language barrier (R. 1415).

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1 "R." refers to the record of the trial proceedings. The pagination is that of the record submitted to the Florida Supreme Court on direct appeal. This record on appeal was made part of the record in the federal proceedings and was reviewed by the District Court and Court of Appeals. The Eleventh Circuit's opinion did not employ the symbol "R." but used "Trial transcript" when referring to the trial record.

BLANCO then took the stand in his own defense. BLANCO denied committing the crime and also denied that the bicycle which police stopped him on the night of his arrest, was the bicycle which he was riding when he was arrested (R. 1441). After BLANCO'S testimony, there was a bench conference held off the record at which time all parties agreed to recess at that time for lunch (R. 1442).

After the lunch recess, Tenbrook again stated that it was not his intention to call the other two witnesses, which BLANCO wanted to be called (R. 1446-1447). Rodriquez explained that he discussed with BLANCO the detriment they felt the testimony might have, but he was still of the same state of mind (R. 1448-1449). The trial court then stated that unless BLANCO had an automatic right to call any witnesses he wanted, the court would have to make a determination if BLANCO was competent to handle the case himself, with the assistance of the attorneys (R. 1452-1453).

The trial court, through the official interpreter, asked BLANCO if he had understood what had been said by the court and what his attorneys had told him (R. 1454-1455). BLANCO then stated when asked if he was satisfied with his attorneys, that he was "regular." BLANCO explained that he was angry with them before because of the problem with the witnesses, but he was "okay with them now." (R. 1455). BLANCO then stated in addition to the two witnesses previously mentioned, he had three other witnesses he wanted to call (R. 1456). BLANCO after being asked by the trial court, stated that his attorneys had talked to him about the additional witnesses and was told they would be detrimental for him (R. 1456-1457). BLANCO still insisted that the witnesses be called.

The trial court then asked BLANCO if his counsel told him why the witnesses would be bad. The court specifically stated that it did not want to know what counsel told him (R. 1457). BLANCO replied that counsel had not told him why (R. 1457). The trial court asked Rodqiquez to explain to BLANCO again why the witnesses would be detrimental (R. 1459).

At that point, BLANCO filed a motion to have the attorneys withdrawn, stating that he had a conflict of interest because counsel refused to call the witnesses, and because counsel did not do in court what they had told him privately they would do (R. 1459-1460). At that point, the trial court began an inquiry into the motion.

During the inquiry, BLANCO complained that Rodriquez was lying to him (R. 1461). The trial court asked BLANCO, without divulging anything that might be confidential, what he was alluding to (R. 1462). BLANCO stated that Rodriquez hadn't reviewed the questions with him before he testified, and that Rodriquez told him he did not have to testify because the evidence the defense was going to present was enough. BLANCO stated that he wanted to testify, and wanted his other witnesses to testify (R. 1462). BLANCO then went on to state why he wanted the witness Martinez called, i.e., to testify about what he knew of BLANCO. (R. 1463). BLANCO complained about the testimony of Rey Alonso (R. 1464). Rodriquez explained that he did not differentiate to BLANCO the distinction between a defense and state witness because BLANCO had indicated that he wanted Alonso called (R. 1465). Rodriquez also explained that Romero and Gonzales' testimony would be beneficial in part by verifying some of BLANCO'S testimony, but would be of limited benefit because of conflicts in their testimony (R. 1465-1466). Rodriquez

further explained that the testimony of Martinez would have been relevant to only collateral matters, and would be cumulative (R. 1466). Rodriquez acknowledged that although he tried to contact Martinez, he did not tell BLANCO he was unsuccessful (R. 1466).

The trial court then asked BLANCO if counsel had advised him that they felt it would be in his best interest if he, himself testified. BLANCO said yes, that they told him why, but he decided to testify anyway. (R. 1467-1468). The trial court stated that because counsel indicated that the other witnesses would have some testimony which was beneficial, then it was incumbent upon counsel to accept BLANCO'S position and put the witnesses on (R. 1468-1469).

At that point, both Tenbrook and Rodriquez moved to withdraw. Tenbrook stated that he would feel that he was not rendering effective assistance of counsel if his independent judgment would be limited. (R. 1469). At that point, the trial court asked counsel to get the witnesses to be presented. (R. 1470). When Rodriquez indicated he could not serve witness, Barbara Lazo (R. 1471), the trial court allowed BLANCO to try to call her to get her there. (R. 1472). Further conversations ensued between the court, counsel and BLANCO about attempts to reach the other witnesses. (R. 1473-1474). Rodriquez explained that he could see no reason to call the witness Carmen Alonso. He stated that she could not corroborate any of the testimony. (R. 1476). Rodriquez explained that he told BLANCO what she said in her deposition, but did not read it to him word by word. (R. 1476). BLANCO stated that Rodriquez did tell him that she would be nervous, did not want to be a witness, and everything that she had said. (R. 1477). When the trial court asked if there was anything Carmen Alonso could say that he felt would be in his

best in interest, BLANCO stated that nobody could do him any harm (R. 1477), and that she would have shown that Rey Alonso was lying. (R. 1478).

The trial court tried to explain to BLANCO about the rules of evidence concerning hostility to his own witnesses. (R. 1479). BLANCO stated that he did not call Rey Alonso, but the state had called him. (R. 1480). Rodriquez stated that he did not tell BLANCO that Alonso was a state witness, and that BLANCO had indicated he wanted Alonso called. (R. 1480).

BLANCO again expressed his dissatisfaction with his lawyers. (R. 1482). The trial court denied the motion to withdraw, and stated that the court felt BLANCO had had competent counsel. (R. 1482). The court again stated that BLANCO would have the right to call his witnesses, and asked defense counsel to contact them. (R. 1483).

Fidel Romero and Enrique Gonzales, then testified in BLANCO'S behalf. Both testified about looking for BLANCO'S papers (R. 1497, 1511) and how BLANCO had a bicycle. (R. 1495, 1512). After the testimony, the court asked counsel about getting the other witnesses. (R. 1523). Rodriquez explained to the court what his efforts had been. Included were the efforts to serve BLANCO'S brother, Rodolfo, who BLANCO also wanted called. (R. 1524). BLANCO indicated that he could also try to get the witnesses there by phone. The trial court ordered that BLANCO get all the calls he needed. (R. 1525). Rodriquez stated he would give BLANCO his home number, Tenbrook stated that he could not, because he did not speak Spanish. (R. 1526). BLANCO stated he was very happy. (R. 1528). Rodriquez went to try to contact the witnesses, while Tenbrook handled the charge conference. (R. 1528).

The next morning, the trial court asked Rodriquez about his efforts in locating the witnesses. (R. 1616). Rodriquez explained how he had talked to BLANCO'S brother, who said he would be there (R. 1617), that he tried to contact Barbara Lazo, but could only leave a message (R. 1618-1619), that he talked to someone who knew Theodoro Martinez, and left a message to contact him. (R. 1620). The court told Rodriquez to try to contact them again (R. 1620). BLANCO then stated what his efforts were to contact the witnesses (R. 1622), including that the home where his brother lived, would not accept the call from him (R. 1623), that he talked to Martinez, who said he would not come voluntarily and would not take BLANCO'S word that he had to be there (R 1624-1625), that he left a message for Barbara Lazo (R. 1627), and that Carmen Alonso's phone was disconnected. (R. 1628).

Rodriquez then came back to the courtroom and informed the court that he called Barbara Lazo's residence and was told she was not there. He left a message. (R. 1629). The same with BLANCO'S brother. (R. 1629-1630). He also left a message at Martinez's place of employment. (R. 1630). The trial court then asked BLANCO what he believed the witnesses would testify to. (R. 1633). BLANCO stated that Lazo would testify as to BLANCO'S physical description (R. 1633), and how long he knew Rey Alonso. (R. 1634). BLANCO stated that he did not know what Carmen Alonso would testify to but expected her to tell the truth about how long she knew him and Rey Alonso. (R. 1636). BLANCO stated that he wanted his brother to testify as to his physical appearance and whether he had seen him with the purse. (R. 1636-1637). As to Theodoro Martinez, BLANCO stated he was going to ask him about when he lived in Hollywood. (R. 1637).

The trial court then asked counsel why they did not want to call the witnesses. Tenbrook referred the court to Barbara Lazo's deposition, that she did not know BLANCO very well. (R. 1640-1641). Rodriquez stated that Martinez was BLANCO'S sponsor when he came into the country, but was not aware of any recent knowledge of BLANCO. (R. 1642). The trial court asked Rodriquez, without violating any privileged communications, whether he was apprised of anything special that Martinez could have testified to, to aid BLANCO. Rodriquez stated no. (R. 1642-1643). The trial court then found that substantial efforts had been made to find the witnesses, but it seemed that no one wanted to cooperate with BLANCO. (R. 1643). The trial court noted that any testimony would probably be cumulative. (R. 1644-1647).

After the verdict was reached, the trial court wanted to continue with the sentencing. (R. 1753). Defense counsel asked for a short continuance. The trial court stated if the jurors agreed to come back it would be all right. (R. 1753-1754). The trial court then informed the jury that the defense indicated that there may be some people they would want to present but who were not then available to testify, and asked if the jury had any problems returning in a few days to allow the defense to find the witnesses. (R. 1759).

At the charge conference, the trial court asked both the state and defense counsel what evidence they were going to present. Rodriquez explained that he talked with BLANCO about calling additional witnesses, specifically his brother and that BLANCO did not want to call his brother. (R. 1780, 1781). Rodriquez explained to BLANCO why he wanted to call his brother, i.e., family background, emotional state. (R. 1782). BLANCO indicated he did not want his brother called. (R. 1782).

Rodriquez then told the court that he was considering calling an expert on linguistics and Latin cultures to testify about some type of cultural shock or mitigating circumstances along these lines. (R. 1782). Rodriquez stated he did not think that type of testimony or argument would be effective, that it would be ridiculed. (R. 1783). In addition, Rodriquez agreed with court's feeling that it would not be compatible with BLANCO'S assertion that he did not kill anyone. (R. 1783). Rodriquez stated that he told that to BLANCO and explained it again. (R. 1783-1784). BLANCO stated that he understood and did not want to call anyone. (R. 1784).

Rodriquez and BLANCO discussed calling a psychiatrist, and they agreed not to call one. Rodriquez saw no evidence of any competency, insanity or emotional duress problems that would constitute a mitigating factor. (R. 1784-1785). The court asked if there were anyone else. BLANCO stated nobody. (R. 1785). Rodriquez stated he explained the nature of the sentencing phase to BLANCO and what evidence he could present. (R. 1785). Rodriquez stated the only witness he would want to call was possibly, BLANCO'S brother, but because his brother had shown a lack of regard in appearing at trial, he did not think his brother's testimony would be beneficial. (R. 1786). The court asked BLANCO if his brother showed up would he want him to testify. BLANCO stated "nada." (R. 1788).

Rodriquez explained that he told BLANCO he had a right to testify in his own behalf. BLANCO gave a preliminary indication that he did not want to. BLANCO stated he explained himself on the stand, and he really did not have much else to say. (R. 1788). Rodriquez explained that BLANCO only had to say something about himself, his background, and what

he would want the jury to recommend. BLANCO indicated that he didn't really care what they recommended. (R. 1789).

After the jury's recommendation of death, BLANCO again indicated he did not wish to speak in his own behalf. (R. 1863). Tenbrook argued against the death penalty, objecting to the court's finding that killing was especially cruel, heinous and atrocious and that the killing was cold, calculated and premeditated. (R. 1863-1864). Tenbrook argued that this was an unfortunate killing in the course of a burglary, but nothing in the facts set it apart from the normal, capital felonies. (R. 1865). BLANCO then stated that he was not responsible for the crimes and was going to appeal. (R. 1867). The trial court then imposed the death sentence. (R. 1867).

The facts germane to question two are set forth in the Eleventh Circuit's decision. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). Other relevant facts will be included in the argument section of this response.

REASONS FOR DENYING THE WRIT

I

THE ELEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISIONS IN DENYING HABEAS CORPUS RELIEF ON THE CLAIM THAT THE TRIAL COURT IMPERMISSIBLY INTERFERED WITH THE DEFENSE IN ALLOWING BLANCO TO CALL WITNESSES IN HIS OWN BEHALF SUCH THAT PREJUDICE SHOULD BE PRESUMED.

BLANCO complains that the Eleventh Circuit's disposition of his claim that the trial court erred in allowing him to call witnesses in his own behalf is in conflict with this Court's decisions in United States v. Cronic, 466 U.S. 648 (1984), Geders v. United States, 425 U.S. 80 (1976), Perry v. Leeke, 488 U.S. 272 (1989), and Faretta v. California, 422 U.S. 806 (1975).

Assuming without conceding that the Eleventh Circuit properly decided that the trial court erred in allowing BLANCO to call witnesses in his own behalf, the Eleventh Circuit correctly denied habeas corpus relief on this claim. See Contra, Dearinger v. United States, 344 F.2d 309 (9th Cir. 1965); Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985); North Carolina v. Fullerton, 196 S.E. 2d 578 (N.C. 1973); State v. York, 282 A.2d 759 (N.J. 1971). This is because the Eleventh Circuit correctly refused to apply a standard of presumed prejudice when evaluating the prejudice resulting from the trial court's alleged error. The Eleventh Circuit's decision in this regard is not in conflict with this Court's decisions in United States v. Cronic, Geders v. United States, and Perry v. Leeke. Indeed, the Eleventh Circuit recognized:

> The Supreme Court held in Washington that "[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.

> So are various kinds of state interference with counsel's assistance." Also, "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." In United States v. Cronic, the Supreme Court held that prejudice sometimes may be presumed "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Moreover, "The Court has uniformly found constitutional error without a showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceedings."

(Footnotes omitted), Blanco v. Singletary, 943 F.2d 1477,1496 (11th Cir. 1991).

The Eleventh Circuit correctly declined to apply a presumption of prejudice to the facts of this case where although the trial court did rule that BLANCO should be allowed to call those witnesses he believed to be beneficial to him, over his attorney's advice, "this interference was not great, and the particular prejudice showing from it is easily discernible and therefore not costly to litigate." Id. at 1497. "The interference amounted to conuntermanding the attorneys' strategic decision not to call two witnesses, nothing more." Id. The Eleventh Circuit elaborated:

> Blanco's attorneys were not otherwise hampered in their conduct of the guilt phase defense. BLANCO'S attorneys examined the witnesses on the stand. And BLANCO was not prevented from consulting with his attorneys for any period of time. "Basic concepts of due process" were not offended by the trial court's actions. We refuse BLANCO'S invitation to presume prejudice.

Id. Clearly, the Eleventh Circuit correctly declined to presume prejudice under United States v. Cronic, Geders v. United States, and Perry v. Leeke where the putative error did not prejudice BLANCO where

BLANCO was at all times represented by counsel, and there was no breakdown in the adversarial process. United States v. Cronic, 466 U.S. at 662. BLANCO at all times acted with the advice of counsel, even though he chose to ignore it. Furthermore, the witnesses' testimony was mostly beneficial to BLANCO and was cumulative to that of defense witness German Berrios (R. 1508) and Rey Alonso (R. 1336). Because the Eleventh Circuit's decision is not in conflict with United States v. Cronic, Geders v. United States or Perry v. Leeke, this Court should decline review of same.

Likewise, the Eleventh Circuit's decision is not in conflict with Faretta v. California where BLANCO never wanted to proceed pro se and where he at all times acted with his attorneys' advice. The Eleventh Circuit held:

> The district court found that BLANCO never indicated a desire to represent himself and simply asked for a change of counsel, which request was denied. BLANCO is correct that he in effect represented himself as to the single decision to call the two additional defense witnesses. But this brief lapse in representation by counsel does not constitute a total absence of counsel or prohibition from providing assistance such that a presumption of prejudice is appropriate. During BLANCO'S limited period of self-representation, his attorneys advised him as to the reasons they did not think the two additional witnesses should be called. BLANCO thus did have the advice of counsel in making his decision to call Gonzalez and Romero, even if he chose not to follow it.

(Footnotes omitted) Blanco v. Singletary, 943 F.2d at 1497. The Eleventh Circuit's analysis and disposition of this claim was correct and not in conclict with Faretta v. California. Accordingly, this Court should decline review.

II

THE ELEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISIONS IN DETERMINING THAT NO IMPERMISSIBLY SUGGESTIVE PRETRIAL IDENTIFICATION PROCEDURES WERE UTILIZED SUCH AS TO INDUCE THE WITNESSES TO MAKE A MISTAKEN IDENTIFICATION.

BLANCO claims that the Eleventh Circuit's rejection of his claim that the identification procedures utilized were unduly suggestive and created a substantial likelihood of misidentification is in conflict with the decisions of this Court. BLANCO'S contentions are without merit.

In disposing of BLANCO'S claim that the eyewitness identifications by Thalia Vezos and George Abdeni were unduly suggestive, the Eleventh Circuit applied the standards set forth by this Court. Specifically, the Eleventh Circuit first determined whether the identification procedures were unduly suggestive and if so, whether under the totality of the circumstances, the identification was reliable. Blanco v. Singletary 943 F.2d at 1508. In determining the reliability, the Eleventh Circuit looked at several factors: (1) the opportunity of the witness to view, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and confrontation. Id. Clearly, the Eleventh Circuit's analysis and disposition of BLANCO'S claim comported with this Court's prior pronouncements in Simmons v. United States, 390 U.S. 377 (1968); Neil v. Biggers, 409 U.S. 188 (1972), and Manson v. Braithwaite, 432 U.S. 98 (1977).

Applying these principles, the Eleventh Circuit properly rejected BLANCO'S claim regarding both Thalia Vezos and George Abdeni. With regard to the identification by Thalia Vezos, Petitioner/-Cross-Respondent would point out that this Court has previously rejected BLANCO'S challenge to same. Blanco v. Florida, 469 U.S. 1181 (1985). Indeed, there was no unnecessarily suggestive procedure utilized regarding Thalia Vezos, contrary to BLANCO'S characterization of the facts. Specifically, the description of BLANCO given by Thalia Vezos was not as much the product of police description as witness recall as BLANCO suggests. Immediately after the offense occurred, Thalia Vezos provided a description of BLANCO to police. Vezos described the assailant as a latin male, between 5'8" to 5' 10", 180 to 190 pounds, wearing a gray or light green jogging suit, with dark curly hair (R. 45). The day after the murder she viewed a line-up. When she saw the men to be in the line-up enter the separate room, she immediately recognized BLANCO (R. 91-92). Detective Walley told her to wait and view the entire line-up before making her identification (R. 101-102). She then positively identified BLANCO (R. 102). The five men in the line-up were about the same height (R. 159). Although BLANCO was the only one without a beard, as found by the trial court, "he's got so much hair on his face I guess it looks like he almost has a beard and moustache to me." (R. 158). In addition, BLANCO appeared a few pounds heavier then the other subjects, "but not much" (R. 158). The Eleventh Circuit correctly agreed with the District Court that "BLANCO'S appearance was in no manner substantially distinguishable from the others [in the line-up so as] to render the procedure impermissibly suggestive." Blanco v. Singletary, 943 F. 2d at 1508.

With reference to the alleged discrepancies referred to by BLANCO regarding Vezos' description of color, the number of shots she heard, and what BLANCO wore on his hand, Petitioner/Cross-Respondent would point out that all of these points were raised by the defense on cross-examination of Vezos and emphasized as inconsistencies in her testimony. The jury was told by Vezos herself that she saw "gloves or something like gloves on the man's hands," but "was not able to tell exactly what they were". (R. 912-913). The discrepancies in the color of the jogging suit were likewise presented to the jury (R. 918). In short, Vezos was skillfully cross-examined as to her identification of BLANCO, as the Eleventh Circuit so noted. Id. Petitioner/Cross-Respondent would also point out that contrary to BLANCO'S assertions otherwise, Vezos was not told that the assailant would be in the line-up. The sentence, "that he would be in with the men in the line-up" (R. 90), has been completely taken out of context by BLANCO. Vezos testified that Detective Mundy told her, there would be five men in the line-up, and he, Detective Mundy, would be in the room with the five men, while detective Walley would be in the other room with Vezos. (R. 90). Clearly, Vezos was not told that BLANCO, the assailant, would be in the line-up.

However, even if the line-up was suggestive, the Eleventh Circuit correctly applied this Court's decision in Neil v. Biggers to find that Vezos' identification was reliable under the totality of the circumstances. The Eleventh Circuit held:

> Vezos had an excellent opportunity to view the accused because she was in the presence of the intruder for ten minutes. Also, there was a light on in her room and the hallway. Vezos exhibited a high level of certainty in her identification, as she pointed out Blanco the instant he walked into the lineup room; the police

> officer accompanying her had to instruct her to wait until she had seen all the men before making a positive identification. Finally, the length of time between the crime and the identification was brief: The lineup identification occurred the day after the crime. We also note that Vezos was extensively cross-examined concerning discrepancies between her statement to the police and her identification, and the jury was able to weigh these discrepancies in reaching its verdict. The lineup identification was sufficiently reliable to be admissible.

Blanco v. Singletary, 943 F.2d at 1508.

Regarding the identification made by George Abdeni, the Eleventh Circuit, applying the same principles announced by this Court, held:

> In this case, Blanco was simply presented to Abdeni. The police did not aggravate the suggestiveness of the encounter. While Abdeni's identification was certainly less reliable than that of Vezos' identification, it does possess the attribute of having been made quite soon after the initial sighting. Also, defense counsel fully pointed out to the jury the various problems with Abdeni's identification.
>
> If this were the only evidence of Blanco's guilt, it would not be sufficient to support the conviction. However, the other evidence introduced at trial, particularly Thalia Vezos' identification, made Abdeni's identification cumulative. The error here, if any, was harmless beyond a reasonable doubt. We do not find that the district court erred in refusing relief on this issue.

Id. at 1508-1509.

The record supports the Eleventh Circuit's ruling on this claim. At the evidentiary hearing on the motion to suppress identification, George Abdeni testified that he lived across the street from the Vezos' house. (R. 63). At about 11:00 p.m. he heard a few very faint shots, and then a young girl shouting. He looked through his window and saw a person dressed in gray jogging suit pass by the house. (R. 65-66). The person was about 20 to 25 feet away, and he could not tell if it was a

man or a woman. (R. 67-68). About an hour later, he heard one of the policemen tell someone that they had a suspect. (R. 68). Abdeni saw a man who he did not recognize sitting in the back of the police car. (R. 73). BLANCO was taken from the police car, with his handcuffs off, and told to stand by a tree approximately 15 yards away. (R. 55). Abdeni viewed the silhouette and told the police that he recognized the jogging suit (R. 69), and form of the person. (R. 75). The trial court did not find the procedure to be suggestive (R. 159), and not prejudicial in that Abdeni could not identify BLANCO, but only the clothing and the form. (R. 150). At trial Abdeni did not identify BLANCO as being the person he saw in the jogging suit. Rather, he only identified the clothing and type of body structure of the person he saw leaving the scene. Further, he did not identify the form as a women as BLANCO suggests. (R. 794-796).

Petitioner/Cross-Respondent thus maintains the correctness of the Eleventh Circuit's ruling on this issue. Under this Court's decisions in Simmons v. United States, Neil v. Biggers, and Manson v. Braithwaite, the out of court and in court identifications of BLANCO by Thalia Vezos and George Abdeni were properly admissible.

BLANCO having failed to demonstrate a conflict between the Eleventh Circuit's decision below and any decision by this Court, has not shown any reason for this Court to grant review. See Rule 10, Rules of the Supreme Court of the United States. His petition for Writ of Certiorari should be denied.

CONCLUSION

Based on the foregoing reasons, the Petitioner/Cross-Respondent respectfully requests that this Court deny Omar Blanco's Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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COUNSELS FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Cross-Petition for Writ of Certiorari was forwarded by U.S. Mail to: Billy H. Nolas and Julie D. Naylor, P.O. Box 4905, Ocala, Florida 32678-4905, counsel for Omar Blanco, Respondent this 1st day of ~~April~~ May, 1992.

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